INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
Argument	8
Conclusion	10

CITATIONS

Cases:

Linn v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53	8
National Labor Relations Board v. *Gissel*, No. 573, O.T., 1968, decided June 16, 1969	8, 9
National Labor Relations Board v. *United Steelworkers*, 357 U.S. 357	8

Constitution and statute:

Constitution of the United States, First Amendment	8
National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*:	
Section 8(a)	2, 7, 9
Section 8(c)	8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 353

R. G. BARRY CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. C, 43-44) is reported at 405 F. 2d 1212. The Board's decision and order (Pet. App. B, 3-41) are reported at 162 NLRB 1472.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1969 (Pet. App. C, 43-44). On May

9, 1969, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to July 19, 1969, and the petition was filed on July 18, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the finding of the National Labor Relations Board that the Company violated Section 8(a)(1) of the Act by threatening its employees with economic reprisals if they selected the Union as their bargaining agent.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition (App. A, pp. 45-46).

STATEMENT

In the fall of 1964, the Union [1] conducted an organizing campaign among the Company's employees, culminating in a Board election on December 2 (Pet. App. 13; Tr. 22-23, 95).[2] During the month of November, the Company's Executive Vice-President, Gordon Zacks, held approximately 50 meetings at which he addressed employees (Pet. App. 13; Tr.

[1] Textile Workers of America, AFL-CIO.

[2] "Tr." references are to the xeroxed portions of the transcript filed as an appendix in the court below.

22-24, 26-28). Two to four meetings were held each day with groups of twelve to fifteen employees (Pet. App. 13; Tr. 24, 29).[3] The meetings were held in the Company's 20-foot square plant lunchroom (Pet. App. 13; Tr. 23).

On the day of each meeting, the employees who were to attend were so informed by their supervisors (Pet. App. 13; Tr. 28-29). Once they arrived in the lunchroom, the employees found coffee and doughnuts, as well as copies of the Union's letter to the Company demanding recognition and copies of *America's Textile Reporter*, containing a comprehensive account of a strike at the Harriet-Henderson Cotton Mills (Pet. App. 13-14; Tr. 35, 69). Company Vice-President Bessie Scott recorded the names of those employees attending the meetings and Zacks announced that anyone who wanted to leave could do so (Pet. App. 13, 14; Tr. 68-69, 93, 99). Zacks stated that he did not want to say anything illegal and then read a prepared text without deviation (Pet. App. 14; Tr. 93-94, 112).

The central theme of Zacks' speech involved the serious economic consequences which could result from selection of the Union. Thus, Zacks stated (Pet. App. 15-16, 167-168):[4]

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[3] A mass general meeting was held before the election in order to reach those employees who could not be included in the smaller meetings (Pet. App. 14; Tr. 65-66).

[4] The entire text of Zack's speech is printed at pages 159-173 of Petitioner's Appendix.

Too many people here at Barry are under the definite mistaken belief that if the union wins the election that the very next day there is going to be a contract signed containing all these promises that the Union has been making. Well, that's not the way this thing works at all. You sit down and you start bargaining and talking about how many holidays are we going to give, what's the vacation policy, what are the fringe benefits going to be. We don't necessarily start from where you are now and try to talk up—the only obligation that the law imposes on us about bargaining and negotiating a contract is to bargain in good faith and only legal obligation concerning wages is to pay $1.25 per hour. We certainly don't mean to imply that we will go back to $1.25. We are merely pointing out our legal obligations. So you see you might end up with more but you might end up with less. And when that union comes in and when we sit down and negotiate you put all the things that you now have and your current wage program right out there on the table and we bargain about them. If they are not agreed to and if they are not included in the contract you may not have them. * * *

Zacks warned the employees of the change in working conditions which might accompany the selection of the Union, as follows (Pet. App. 16-17, 170-171):

Why is my family and I—why are we opposed to a union coming into Barry. Well, the reason that we are opposed to this union coming in here is not that we are afraid of the union or afraid of what the union can get from us—believe me they can't get any more for you than

you can get for yourself by coming in here and talking to me man to man. But we are opposed to this union because we might lose the flexibility that we now have. We have a lot of flexibility in this operation right now. Under a union contract we might not have this flexibility. If we didn't have a job for you, we couldn't transfer you to other work as we do. We might have to send you home. We might have to lay you off. In the past we've traded work for you to avoid layoffs and tried to provide instead year round employment, the union might demand that we lay you off and hire somebody else on the other job. Because that means another $5.00 in monthly dues. Every time we would do something like that we might have a grievance—every time we would do a thousand things for you that we do now, we might get involved in a grievance session and not only would we get involved in a grievance but we might end up in court. There are just so many things that could be completely changed and completely different here. But the primary reason that we are opposed to a union at Barry is because it could destroy the personal relationship that we have developed with each other. As I've said, you couldn't talk to me or my father or Bessie or your supervisor or anybody else about these matters—you would have to see the shop steward. A wall of separation could be built between us. We could be divided. We have grown and prospered together because we have worked well together. Because we have respected each other as individuals—we have different skills and different jobs—but we've been on the same team. * * *

Finally, Zacks raised the possibility that the Company would sell the plant if the employees selected the Union to represent them (Pet. App. 18-19, 172):

> My family has had a lot of fun out of building this business together. But to be very frank with you neither my father or mother or I would be interested in coming to work in a hostile atmosphere. There has been a lot of talk about profits. We've tried to show you in pie charts the real financial picture of the Company and if you look at those things carefully, which were presented from our accountant's figures, you saw that actually what the stockholders got were very small slices of pie. In fact, I am embarrassed by the smallness of the slice.
>
> We've had many chances to sell this business in the past but we didn't want to. We could sell this whole operation today but we don't want to because my whole family gets a lot of fun out of this operation. I think you know that—I think you know that I get a lot of fun, a lot of bounce from this business and it gives me something to look forward to. In fact, I'd get no kick out of quitting tomorrow and never working again. But we could sell this whole operation and take the cash that we get from it and put it in tax free municipal bonds and we could come out with as much profit as we get from coming in here and enjoying these headaches. And I assure you that we do enjoy them. We like every problem that comes up every day. All we ask is the opportunity to continue in the future as we have in the past. We'd rather have our headaches together than clip coupons from municipal bonds.

Zacks also instructed the supervisors to make themselves accessible to the employees and to report to him the issues in which the employees were interested (Pet. App. 21-22; Tr. 39-40). Zacks' purpose was to attempt to evaluate the impact of the meetings upon the employees (Pet. App. 22; Tr. 40). During this period, certain employees were questioned by supervisors concerning their union sympathies and the reasons why other employees might be interested in unionization. (Pet. App. 22-24; Tr. 94-97, 140.)[5]

The Union lost the December 2 election and filed unfair labor practice charges on December 9, 1964.[6] On February 8, 1965, while the charges were pending, the Company posted a notice (Pet. App. 10-12, 175-176) urging its employees not to cooperate with those seeking to interview them (Pet. App. 10; Tr. 182-184). Shortly thereafter, Zacks was informed that the Board investigation was proceeding at that time; he neither removed the notice nor amended its contents (Tr. 193-194).

The Board adopted the Trial Examiner's finding that the Company violated Section 8(a)(1) of the Act by threatening its employees with more difficult working conditions, reduction of their wages, and loss of work if the Union were selected as their bargaining representative; by interfering with the right of its employees to give statements to Board

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[5] In addition, the Board found that as early as October 8, 1964, employee Cooley was questioned by her supervisor concerning her own and other employees' union sentiments (Pet. App. 23-24; Tr. 130-133).

[6] The charges were amended on December 24, 1964.

agents; and by interrogating employees as to their union affiliation (Pet. App. 4, 36). The Board ordered the Company to cease and desist from the unfair labor practices found, and to post the appropriate notices (Pet. App. 36-38).

The court of appeals, in a *per curiam* order, enforced the Board's order (Pet. App. C 43-44).

ARGUMENT

In *National Labor Relations Board* v. *Gissel Packing Co.*, No. 573, O.T., 1968, decided June 16, 1969, this Court stated that, in order to be entitled to the protection of the First Amendment or Section 8(c) of the Act, an employer's predictions of the effects of unionization "must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionizaion" (slip op., p. 40). But "[i]f there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such without the protection of the First Amendment" [7] (slip op., pp. 40-41).

[7] This Court's opinions in *National Labor Relations Board* v. *United Steelworkers*, 357 U.S. 357, and *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (Pet. 12, 13), are, of course, entirely consistent with this standard.

Consistent with these teachings, the Board correctly found that Vice-President Zacks' speech contained statements which exceeded the boundaries of privileged speech and constituted interference, restraint and coercion in violation of Section 8(a)(1) of the Act. Thus, while making it clear that the Company was against unionization, and after emphasizing the Company's ultimate control over wages and working conditions, Zacks warned the employees of the adverse consequences which unionization might bring, such as loss of jobs, layoffs, and deprivation of benefits previously enjoyed. Zacks also warned the employees that, even though he had passed up opportunities to sell the Company in the past, he and his family would not be interested in coming to work in a hostile atmosphere and they could just as easily take their profits from the business and "clip coupons from municipal bonds," *supra*, at pp. 4-6. These remarks were not "predictions of 'demonstrable economic consequences' ", nor were the actions threatened related to economic necessities. Thus, the Board properly found that these remarks implied threats of retaliatory action.[8]

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[8] The cases cited by petitioner (Pet. Br. pp. 14-16) are not inconsistent with this conclusion, since the determination whether an employer's remarks constitute threats of reprisal prohibited by Section 8(a)(1) or an expression of views and opinion protected by 8(c) turns primarily on the facts of the particular case. Moreover, those cases preceded this Court's decision in *Gissel Packing Co., supra*, and it is doubtful whether the views expressed with respect to the scope of Section 8(c) of the Act in those cases accord with *Gissel*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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